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BLACK BOX: THE LLC AND THE FUTURE OF DISCLOSURE REQUIREMENTS

Daniel Murray

I. INTRODUCTION

This paper will seek to evaluate the use of LLCs in the United States to mask illicit or illegal behavior. Since becoming the preeminent business entity, the benefits of utilizing an LLC are also used to facilitate ongoing criminal activity, with law enforcement agencies often struggling to keep up with the ever-growing web of entities. The inability to ascertain the beneficial or “true” owner of an LLC has hindered good government groups and law enforcement from shining a light on activities like tax evasion, money laundering, and the financing of terrorism and drug trafficking. In recent years, there has been a significant push to impose reporting requirements that seek to aggregate data on the beneficial owners of LLCs and other corporate entities that can be used as shell companies. While Congress has recently passed the Corporate Transparency Act, additional work is likely needed to strengthen our financial disclosure laws and to provide law enforcement agencies with the adequate resources necessary to enforce those laws.

Part II of this paper will review the history of the LLC as corporate entity and its rapid ascent to becoming the most used corporate entity in the United States. Part II will also evaluate the benefits of the LLC structure, including contractual flexibility, limited liability protection, low costs of incorporation, and the ease at which an individual can establish one in most states in the United States.

Part III of this paper will look at the problem of LLCs being used as shell companies to mask and facilitate illegal activity. This analysis will entail the difficulty for forensic accountants and law enforcement agencies in ascertaining the beneficial owner of an LLC being used as a shell. Part III will also evaluate the role of corporate agents and trusts and company

service providers in obscuring the beneficial owner of an LLC. The section ends with an introduction to the concept of “layering” and how it amplifies the difficulties of investigating the beneficial owner of a shell company(s) engaged in illegal activities.

Part IV addresses the various schemes and crimes that are facilitated by the use of a shell LLC. This paper will demonstrate the mechanics behind how an LLC or shell company is used by individuals engaging in tax evasion, money laundering, and making “dark money” donations for certain political activities.

Part V looks at various legislative acts passed by the European Union and the United States to combat the use of shell companies that mask beneficial owners engaged in crimes. This section will evaluate the recently passed Corporate Transparency Act and some of the potential benefits and drawbacks that the law could have on businesses that must comply with the Act. Part V will end with a comparison between the CTA and the European Union’s Anti-Money Laundering Directive and additional actions that legislators can take to increase transparency into beneficial ownership of LLCs.

While the CTA is a necessary first step in cracking down on the abuse of the LLC structure, it is imperative that the American public and law enforcement agencies adhere to and enforce the law. Additionally, the United States Department of Treasury and the Department of Justice must monitor the CTA’s implementation and stay attuned to possible exploitation of potential weaknesses in the CTA. The CTA is a significant act of legislation, but the federal government must not rest on its laurels because one thing is for sure: bad actors will always find new ways to skirt the law to ensure the continuity of their operations.

II. LLC FORMATION AND THE BENEFITS OF AN LLC STRUCTURE

This section will look at the creation of the LLC as a corporate entity through the passing of numerous LLC acts across the United States. It did not take long before the LLC became the preferred corporate entity for large and small businesses. The rise of the LLC can be attributed to many reasons ranging from administrative convenience to the secrecy it affords to its beneficial owners. However, one thing is not in doubt: the LLC is the preeminent corporate structure in the United States.

A. BIRTH OF THE LLC

Before the 1970's, the LLC did not exist as a corporate entity. Wyoming was the first state to pass legislation creating and approving the use of the limited liability company as a corporate structure when in 1977, the state legislature passed the Limited Liability Company Act in an attempt to create an entity that would provide the limited liability protection of a corporation while receiving the tax treatment of a partnership.¹

In 1988, the IRS issued Revenue Ruling 88-76, which affirmed that an LLC governed by the Wyoming Limited Liability Company Act would be taxed as a partnership.² Once the IRS affirmed the LLC's dual nature, other states quickly began to adopt LLC acts of their own. By the end of 1991, Florida, Colorado, Kansas, Nevada, Texas, Virginia, and Utah passed their own LLC statutes, eight other states had introduced bills to enact LLC acts, and another thirteen states had created groups to study the enactment of LLC acts.³

¹ Louis G. Hering, David A. Harris, R. Jason Russell, *Limited Liability Companies: Legal Aspects of Organization, Operation, and Dissolution*, No. 67-2nd Corporate Practice Portfolio Series (BNA), A-2 (2019).

² *Id.*

³ Robert R. Keatinge, Larry E. Ribstein, Susan Pace Hamill, Michael L. Gravelle & Sharon Connaughton, *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 378-79 (1992).

Seeking to replicate LLC's early successes in other states and jurisdictions, Delaware adopted its own LLC act in 1992. By 1996, every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands had passed an LLC act.⁴

B. ADOPTION OF THE LLC AS THE PREEMINENT CORPORATE STRUCTURE

Following the passage of the LLC Acts, the LLC quickly became the preferred corporate entity of choice by many individuals and parties. Tax considerations drove much of the early evolution of the LLC. Until 1997, the IRS required that an LLC sufficiently resemble a partnership in order to receive partnership or “pass-through” tax treatment. In effect, an LLC would receive partnership tax treatment only if it lacked at least two of the following characteristics: perpetual existence, free transferability of interests, and centralized management. The earliest LLC acts, such as the 1977 Wyoming LLC Act, addressed this as a matter of statutory design: every LLC governed by the statute necessarily would lack each of these features, ensuring that all LLCs organized under the statute would qualify for partnership tax treatment.⁵ In 1997, the IRS’s check-the-box regulations became effective. These regulations allow unincorporated entities to elect whether they will be taxed as a partnership or as a corporation.⁶

The speed with which other states adopted LLC acts demonstrated the demand of a corporate entity with the dual characteristics of limited liability and pass-through taxation.⁷ LLCs offered additional benefits, such as the ability to have only a single member (in contrast to

⁴ *Revised Prototype Limited Liability Company Act*, 67 BUS. LAW. 117, 117 (2011).

⁵ *Id.*

⁶ 26 C.F.R. § 301.7701-3 (2019).

⁷ Donald F. Parsons, Jr., R. Jason Russell, and Koah M. Dowd, *The Business Lawyer—Seventy-Five Years Covering The Rise Of Alternative Entities*, 75 Bus. Law. 2467, 2476 (Fall 2020).

the limited partnership structure), the flexibility to choose the structure of management and ownership, and greater confidentiality.⁸

The freedom to elect the specific tax treatment of an LLC was a consequential shift in the development of LLCs. LLCs were no longer required to maintain certain partnership characteristics to utilize the tax treatment afforded to the partnership and the limited liability protection afforded to the corporation.⁹ LLC acts adopted after this point further loosened requirements on form, and thus LLCs began to take on more corporate characteristics.¹⁰

Since the widescale adoption of LLC acts, Delaware has become the leading jurisdiction for entity formation and alternative entity formations.¹¹ The use of LLCs has grown dramatically compared to the traditional corporate formations over the last 15 years.¹² As of the end of 2018, there were 958,734 LLCs, 313,852 corporations, and 101,818 limited partnerships in existence in the State of Delaware.¹³ The tremendous growth of the use of LLCs over the last couple of decades will likely continue into the future as both small and large businesses value the flexibility of the structure and liability protection it provides.

C. BENEFITS OF THE LLC STRUCTURE

⁸ *Id.*

⁹ Charles W. Murdock, *Limited Liability Companies in the Decade of the 1990s: Legislative and Case Law Developments and Their Implications for the Future*, 56 BUS. LAW. 499, 501 (2001).

¹⁰ *Id.*

¹¹ See Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1749 (2006) (“It is well known that among the fifty states, Delaware occupies an outsized place in the formation of business entities, particularly publicly held corporations.”); Lewis S. Black, Jr., *Why Corporations Choose Delaware*, Delaware Department of State, Division of Corporations, 1 (2007) (“Delaware has been preeminent as the place for businesses to incorporate since the early 1900s, and its incorporation business, supplemented by the growth in numbers of such ‘alternative entities’ as limited liability companies, limited partnerships and statutory trusts, continues to grow smartly.”).

¹² *Id.*

¹³ See Parsons, Jr., *supra* note 7, at 2469 (“These statistics were provided by the Office of the Secretary of State of the State of Delaware on October 21, 2019.”).

As LLCs became more prevalent, more firms sought to utilize the LLC's potential because it enabled firms to simplify transactions and invoke a liability shield that previously would have been required solely through the form of a corporation.¹⁴

Instead of abiding by the strict legal requirements associated with the corporation, private parties could freely shape by contracting the management and equity structures in an LLC.¹⁵ Private parties could adjust the fiduciary duties owed by a majority owner of an LLC because of the greater flexibility permitted by LLC acts, while also ensuring that all members of the LLC would have limited liability.¹⁶ Over time, Delaware became the jurisdiction of choice for parties seeking maximum corporate flexibility when incorporating LLCs.¹⁷

The structure of an LLC, and its relatively uncomplicated incorporation procedures, were also attractive to smaller businesses. Smaller business ventures, including “mom and pop” businesses, often form LLCs under the law of the state of their principal place of business.¹⁸ Moreover, in addition to the flexibility of the LLC structure, LLCs are logistically easy to form, taking as little as two hours and costing between \$100-\$200 in several states.¹⁹ For example, in Delaware, an LLC can be set up in less than one hour by any of the many incorporation services located in the state.²⁰ All that is needed in Delaware to set up an LLC is the name and address of a registered agent located in the state.²¹

¹⁴ *New Developments in Structured Finance*, 56 BUS. LAW. 95, 146 (2000).

¹⁵ Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 BUS. LAW. 1469, 1469 (2005); *New Developments in Structured Finance*, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Franklin A. Gevurtz, *Why Delaware LLCs?*, 91 OR. L. REV. 57, 101 (2012).

¹⁹ Max Biedermann, *G8 Principles: Identifying the Anonymous*, 11 BYU INT'L L. & MGT. REV. 72, 76 (2015).

²⁰ DEL. CODE ANN. tit. 8, §§ 131 -132 (West 2010).

²¹ *Id.* at § 132.

There is no denying that the LLC provides parties with a great deal of flexibility in private contracting, exemplary liability protections, and cheap administrative costs. These benefits are directly correlated to the success and prevalence of the LLC, and will likely lead to its continued use in the years to come.

III. LLC AS A SHELL COMPANY

This section will evaluate the darker side of the use of LLCs. While the LLC is primarily used for legal and legitimate purposes, it is often the preferred corporate entity for individuals seeking to mask their illegal activities. First, this section will address the concept of a “shell company” and how LLCs can be used as a shell company to facilitate and hide illegal activity. Second, this section will look at the problems that law enforcement agencies have in determining who the beneficial owner(s) are in an LLC that is being used as a shell company. Third, this section will take a closer review of the role of trusts and company service providers (TCSPs) and registered agents in masking the beneficial owner of an LLC and how easy they make it for nefarious individuals seeking to quickly create an LLC as a shell company.²² Finally, this section will end with an introduction into the concept of layering and how it is in jurisdictions across the world to create a maze of shell companies with the intent of confusing law enforcement agencies.

A. DEFINITION OF A SHELL COMPANY

²² Daniel Nesbitt, *TCSPs: The New Gatekeepers of the Financial System*, Global Regulation & Policy (Sept. 7, 2019), <https://www.ifcreview.com/articles/2019/july/tcps-the-new-gatekeepers-of-the-financial-system/> (Defining a TCSP “as a person or entity participating professionally in the creation, administration and management of trusts and corporate vehicles.”).

A “shell company” is commonly understood to refer to an LLC or other entity that no significant assets or ongoing business activities.²³ Shell companies disguise their ownership “in order to operate without scrutiny from law enforcement or the public.”²⁴ When LLCs are used as shell companies, they often exist solely to own other entities or act as a assetless vehicle that often transfers “large sums of money worldwide.”²⁵

Shell companies often lack a physical presence, other than having a mailing address.²⁶ It follows that a shell company has no employees and produces minimum independent economic value.²⁷ Due to the lack of a physical presence, shell companies often share the exact same registered address with thousands of other shell companies.²⁸ Commonly used stated business purposes are often generic descriptions like “to conduct legitimate transactions, such as cross-border currency and asset transfers” or “to facilitate corporate mergers and reorganizations.”²⁹ The opaqueness of a shell company often increases in a jurisdiction that does not require the disclosure of the identity of the beneficial owner of the shell.³⁰ The proliferation of shell companies in favored jurisdictions has made ascertaining the beneficial owner of an LLC acting as a shell company nearly impossible.

B. THE PROBLEM OF BENEFICIAL OWNERSHIP

²³ Nicholas Vail, *Cracking Shells: The Panama Papers & Looking To The European Union’s Anti-Money Laundering Directive As A Framework For Implementing A Multilateral Agreement To Combat The Harmful Effects of Shell Companies*, 5 Tex. A&M L. Rev. 133, 136 (2017).

²⁴ Shima Baradaran, Michael Findley, Daniel Nielson & Jason Sharman, *Funding Terror*, 162 U. PA. L. REV. 477, 492 (2014).

²⁵ *Id.*

²⁶ FIN. CRIMES ENFT NETWORK (FINCEN), U.S. DEPT. OF THE TREASURY, THE ROLE OF DOMESTIC SHELL COMPANIES IN FINANCIAL CRIME AND MONEY LAUNDERING: LIMITED LIABILITY COMPANIES, 4 (2006).

²⁷ *Id.*

²⁸ Ryan C. Hubbs, *Shell Games: Investigating Shell Companies and Understanding Their Roles in International Fraud*, FRAUD MAG. (July/Aug. 2014 Issue), <http://www.fraud-magazine.com/article.aspx?id=4294983054>.

²⁹ FINCEN, *supra* note 26.

³⁰ Biedermann, *supra* note 19, at 74.

To understand how LLCs mask the true identity of the individual(s) or parties behind the entity, it is essential to understand the concept of “beneficial ownership.” The Securities and Exchange Act of 1934 defines “beneficial owner” as any “person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security.”³¹ Other definitions of “beneficial owner” include any “individual who has a level of control over, or entitlement to, the funds or assets of a corporation or ... [LLC] that, as a practical matter, enables the individual, directly or indirectly, to control, manage, or direct the corporation or ... [LLC]” and “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted.”³² However, most simply understood is that a “beneficial owner” is a natural person “who exercises ultimate effective control over a legal person or arrangement.”³³

Many LLC acts allow parties to obscure the actual beneficial owners of an LLC via shell companies. If an LLC is established in a jurisdiction that has little regard for beneficial ownership transparency, such as the Cayman Islands, Delaware, Nevada, and Wyoming, it is close to impossible to ascertain the beneficial owner of an LLC.³⁴ Shell companies are often

³¹ Securities Exchange Act of 1934, 17 C.F.R. § 240.13d-3(a) (2010); Avnita Lakhani, *Imposing Company Ownership Transparency Requirements: Opportunities for Effective Governance of Equity Capital Markets or Constraints on Corporate Performance*, 16 CHI.-KENT J. INT'L & COMP. L. 122, 131 (2016).

³² See Incorporation Transparency and Law Enforcement Assistance Act, S. 569, 111th Cong. §3(a)(1) (2009) (noting the amendment to (a)(1) and addition of (e)(1)); FINANCIAL ACTION TASK FORCE (FATF), TRANSPARENCY AND BENEFICIAL OWNERSHIP 8 (Oct. 2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>.

³³ *Id.*

³⁴ Idelys Martinez, Comment, *The Shell Game: An Easy Hide-and-Go-Seek Game for Criminals Around the World*, 29 ST. THOMAS L. REV. 185, 196-97 (2017).

appealing in jurisdictions that do not require the disclosure of beneficial ownership because it leads to difficulty for law enforcement and private individuals to identify the legitimate beneficial owner of the shell company.³⁵ The inability to ascertain the beneficial owner of an LLC impedes law enforcement and forensic accountants' ability to track the movements of capital, recover stolen assets, and investigate untaxed income.³⁶

A significant challenge to achieving increased transparency in LLC ownership is that transparency of beneficial ownership requirements significantly differs among jurisdictions and states.³⁷ In the U.S., where entity formation requirements are administered by the each of the individual states, significant differences in disclosure legal requirements make some states more favorable in entity formation than others. To illustrate the discrepancy between states, in 2006, the General Accountability Office found that no state collected beneficial ownership information on corporations, only a few collected it on LLCs, and only four states collected minimal information on LLCs.³⁸ Additionally, less than half of the states collected information about management, directors, and officers of corporations.³⁹ And while most states collected information on corporate officers and LLC managers in periodic reports, including information on the beneficial owners of LLCs, this information was often not verified.⁴⁰ This situation was still the state of play up until the passing of the Corporate Transparency Act.⁴¹

³⁵ Dean Kalant, Comment, *Who's in Charge Here? Requiring More Transparency in Corporate America: Advancements in Beneficial Ownership for Privately Held Companies*, 42 J. MARSHALL L. REV. 1049, 1051 (2009).

³⁶ *Id.* at 1052-54.

³⁷ Anonymous, *Corporate Ownership and Corruption: How to Crack a Shell*, THE ECONOMIST, at 56 (May 7, 2016).

³⁸ Martinez, *supra* note 34, at 194-95; U.S. GOVT. ACCOUNTABILITY OFFICE (GAO), GAO-06-376, COMPANY FORMATIONS: MINIMAL OWNERSHIP INFORMATION IS COLLECTED AND AVAILABLE 41-42 (2006), <http://www.gao.gov/new.items/d06376.pdf>.

³⁹ GAO, *supra* note 38, at 16.

⁴⁰ *Id.*

⁴¹ Martinez, *supra* note 34, at 194-95.

*C. THE ROLE OF TCSPs AND REGISTERED AGENTS IN MASKING THE BENEFICIAL
OWNER OF AN LLC*

Amplifying the issue of untangling the opaque structure of a mysterious LLC, corporate formation agents and trusts and company service providers (TCSPs) are often not licensed with states.⁴² TCSPs provide various services dealing with the formation and incorporation of LLCs and seek to streamline the process to the benefit of the parties seeking to create an LLC.⁴³ Because TCSPs are often not required to obtain a license in the relevant state they seek to conduct business, they lack the incentive to collect and verify information pertaining to the beneficial ownership of an LLC.⁴⁴

In many cases, all that is needed to establish a shell company is the identity and address of a registered agent.⁴⁵ Registered agents are often viewed as “guns for hire” in that they usually have no meaningful relationship with the companies and business entities that they represent.⁴⁶ This practice is best exemplified in the state of Delaware, where roughly two hundred registered agents represent more than one million corporations in the state.⁴⁷

D. LAYERING

Compounding the issue of ascertaining the beneficial owner of a shell company or LLC is the practice of layering. Money launderers, tax evaders, and other criminals often use a layer or

⁴² John Christensen, *The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface*, 57 CRIME, L. & SOC.CHANGE 325, 335 (2012).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ DEL. CODE ANN. tit. 8, § 132 (West 2010).

⁴⁶ Alana Goodman, *This Delaware Address Is Home to 200,000 Shell Companies--Including Hillary Clinton's*, WASH. FREE BEACON (Apr. 11, 2016), <http://freebeacon.com/issues/delaware-addresshome-200000-shell-companies-including-hillary-clintons/>.

⁴⁷ Suzanne Barlyn, *Special Report: How Delaware Kept America Safe for Corporate Secrecy*, REUTERS (Aug. 24, 2016), <http://www.reuters.com/article/us-usa-delaware-bullock-specialreport-idUSKCN10Z1OH>.

chain of entities incorporated in various jurisdictions to maintain privacy by creating a complex network of entities that is difficult to account for and track. The process of layering makes it difficult to near impossible for law enforcement agencies and forensic to ascertain the beneficial owner of a shell company.

In a layered legal structure, layers of legal entities exist between the beneficial owner and the assets or money of the shell company that holds legal title to those assets or money.⁴⁸ The layering of entities across the world (e.g., Jersey, Cyprus, the United States, and the British Virgin Islands) provides access to the global banking system in the names of the different entities located within the layer.⁴⁹ While most individuals think of foreign countries like Panama and the Cayman Islands as the most common culprits of opaque entity formation practices, it is also common practice for LLCs and other legal entities in the United States to engage in layering.⁵⁰ For example, tax evaders in the United States will often engage in a scheme utilizing a “daisy chain” of shell companies.⁵¹ Daisy chains are a series of several entities, fictitious and real, that are controlled “by a single person or group of persons.”⁵²

The practice of layering can add significant complexities to tracking down the beneficial owner of an LLC or shell company. Unfortunately, because incorporating LLCs is not the least bit burdensome, many individuals and entities see little downside in creating as many LLCs or other shell companies as possible and then layering them into their network of other entities. If

⁴⁸ Emile van der Does de Willebois, Emily M. Halter, Robert A. Harrison, Ji Won Park, J. C. Sherman, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, The World Bank, 19 (2011), <https://openknowledge.worldbank.org/bitstream/handle/10986/2363/9780821388945.pdf?sequence=6&isAllowed=y>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *United States v. Veksler*, 62 F.3d 544, 547 (3d Cir. 1995).

⁵² *United States v. Veksler*, 862 F.Supp. 1337, 1340 (E.D. Pa. 1994).

the layered entities are located in multiple jurisdictions across the world it becomes extremely consuming and challenging to monitor.

IV. LLC AS A VEHICLE FOR ILLICIT AND ILLEGAL ACTIVITY

This section will provide concrete examples of the various crimes that are facilitated by the use of LLCs. First, we will evaluate the use of the LLC as a vehicle to engage in tax evasion. The United States is considered by many to be one of the world's largest tax havens, and the LLC and its lack of transparency into beneficial ownership is a major reason why tax evaders are able to skirt their tax obligations. Second, the LLC is often used to engage in money laundering activities to "clean" income obtained through illegal activities. This section will provide two examples of infamous individuals who used LLCs incorporated in the United States to further their criminal schemes. Finally, this section will look at the use of LLCs in the United States electoral process and how the entity is used to hide the identity of donors who seek to fund political causes that run contrary to public opinion.

A. TAX EVASION

The United States is considered to be one of the world's largest tax havens.⁵³ According to the Internal Revenue Service, the costs of tax evasion result in the federal government losing an average of \$458 billion per year.⁵⁴ Due to business-friendly secrecy laws, tax evaders and other parties intent on masking nefarious behavior utilize shell entities to hide illegally obtained

⁵³ Jesse Drucker, *The World's Favorite New Tax Haven Is the United States*, BLOOMBERG (Jan. 26, 2016), <https://www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-unitedstates>.

⁵⁴ Chris Matthews, *Here's How Much Tax Cheats Cost the U.S. Government a Year*, FORTUNE (Apr. 29, 2016), <https://fortune.com/2016/04/29/tax-evasion-cost/>.

assets and illicit activities. Shell companies, and LLCs in particular, are used to mask the identities of the entity's true beneficial owner.⁵⁵

The shrewdest tax evasion schemes insulate the tax evader through many layers of shell entities, such as trusts, LLCs, etc. These schemes also incorporate misdirection by creating the appearance that the wrongdoer has no control over the shell entity, and that those in control of the entity are located in an offshore jurisdiction.⁵⁶ In 2011, a World Bank Study found that 70% of 213 large-scale corruption cases relied on the secrecy of shell entities to hide the beneficial owner's identity.⁵⁷

In addition to having favorable tax laws, in 2017, the United States ranked second in terms of providing financial secrecy to owners of corporate entities.⁵⁸ Delaware and Nevada, in particular, are considered to have two of the most business-friendly secrecy laws in the world.⁵⁹ The United States, primarily because of Delaware, was ranked third in the 2015 Financial Secrecy Index, a report from the Tax Justice Network, an organization that "ranks jurisdictions according to their secrecy and the scale of their offshore financial activities."⁶⁰ This ranking is

⁵⁵ Baradaran, *supra* note 24.

⁵⁶ Bryan S. Arce, *Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded U.S. Taxes*, 34 BROOK. J. INT'L. L. 465, 471-472 (2009).

⁵⁷ Global Witness, *Poverty, Corruption And Anonymous Companies: How Hidden Company Ownership Fuels Corruption And Hinders The Fight Against Poverty*, 2 (Mar. 2014), https://cdn2.globalwitness.org/archive/files/library/anonymous_companies_03_2014.pdf.

⁵⁸ Lynnley Browning, *Report Says U.S. is World's Second-Biggest Tax Haven*, BLOOMBERG (Jan. 30, 2018) <https://www.bloomberg.com/news/articles/2018-01-30/u-s-seen-as-world-s-second-biggest-taxhaven-after-switzerland>.

⁵⁹ *Delaware: The US Corporate Secrecy Haven*, TRANSPARENCY INT'L (Jan. 12, 2016), https://www.transparency.org/news/feature/delaware_the_us_corporate_secrecy_haven.

⁶⁰ *Financial Secrecy Index*, TAX JUST. NETWORK (Nov. 2, 2015), <http://www.financialsecrecyindex.com>.

supported by the fact that over one million businesses, including foreign companies, have been incorporated in the state of Delaware.⁶¹

B. MONEY LAUNDERING

LLCs and other forms of business entities are often used to launder money obtained through illegal and illicit activities. In the United States, the combination of business-friendly secrecy laws and the simplicity behind incorporating a shell company has not just attracted shady domestic actors but also international arms dealers, Central and South American drug cartels, and Russian organized crime syndicates.⁶²

Viktor Bout is an international arms dealer, known as the “Merchant of Death” or the “Lord of War,” currently serving a twenty-five-year sentence in U.S. federal prison.⁶³ Throughout his infamous career, Bout supplied and transported weapons to both sides of the civil war in Angola, to Rwandan soldiers fighting in the Eastern Congo, and leased cargo planes to Muammar Qaddafi.⁶⁴ On March 6th, 2008, Bout was arrested after Drug Enforcement Agency (DEA) agents recorded him offering to sell anti-aircraft missiles to undercover agents posing as members of the Colombian FARC guerilla group and intended to use the missiles to kill U.S.

⁶¹ ST. DEL., <https://corp.delaware.gov> (last visited Mar. 20, 2021) (claiming Delaware is home to more than one million companies); U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/10> (last visited Mar. 20, 2021) (listing Delaware's population at 973,764).

⁶² Lynnley Browning, *Delaware Laws, Helpful to Arms Trafficker, to Be Scrutinized*, The New York Times (Nov. 4, 2009), <http://www.nytimes.com/2009/11/05/business/05tax.html>; Nicole Hong, *What El Chapo's Trial Revealed: The Inner Workings of a \$14 Billion Drug Empire*, Wall Street Journal (Feb. 12, 2019), <https://www.wsj.com/articles/what-el-chapos-trial-revealed-the-inner-workings-of-a-14-billion-drug-empire-11550011564>; Garrett M. Graff, *If Trump Is Laundering Russian Money Here's How It Works*, Wired (May 11, 2018), <https://www.wired.com/story/if-trump-is-laundering-russian-money-heres-how-it-works/>.

⁶³ Bryce Tuttle, *The Laboratories of Financial Secrecy*, The American Interest (Sept. 8, 2020), <https://www.the-american-interest.com/2020/09/08/the-laboratories-of-financial-secrecy/>

⁶⁴ *Id.*

troops.⁶⁵ In 2011, Bout was tried and convicted in federal court of conspiracy to kill U.S. nationals, conspiracy to kill federal officers, conspiracy to acquire anti-aircraft missiles, and conspiracy to provide material support to a foreign terrorist organization.⁶⁶

It should come as no surprise that Bout was able to build his arms dealing empire through the use of various shell companies incorporated across the globe.⁶⁷ The United States was not immune from Bout's love of shell companies as he used at least eleven U.S. companies located in Texas, Florida, and Delaware to launder millions of dollars from sales of illegal arms.⁶⁸

More recently, the Special Counsel Investigation into Russian interference in the 2016 United States election exposed the American public to the use of shell companies by individuals seeking to evade the watchful eye of the United States government. The Special Counsel Investigation led to the arrest of Paul Manafort, President Donald Trump's former campaign manager.⁶⁹ Manafort generated tens of millions of dollars in income working on behalf of a Ukrainian political party but avoided paying federal income taxes by hiding payments for his work in bank accounts in Cyprus.⁷⁰

To avoid falling under the eye of the Internal Revenue Service and Federal Bureau of Investigation, Manafort would keep his income from his lobbying activities offshore in Cypriot bank accounts but made payments totaling \$18 million from those accounts for property, goods,

⁶⁵ *Id.*

⁶⁶ *United States v. Bout*, 731 F.3d 233, 236 (2d Cir. 2013).

⁶⁷ Browning, *supra* note 62.

⁶⁸ Tuttle, *supra* note 63.

⁶⁹ Wilson Andrews and Alicia Parlapiano, *How a Federal Inquiry Says Paul Manafort Laundered \$18 Million, and How He Spent It*, The New York Times (Oct. 31, 2017), <https://www.nytimes.com/interactive/2017/10/31/us/politics/manafort-mueller-money-laundering-fraud.html>.

⁷⁰ Katelyn Polantz and Evan Perez, *Investigators detail Manafort money from Ukrainian corruption, Russian oligarch*, CNN (June 28, 2018), <https://www.cnn.com/2018/06/28/politics/mueller-search-warrants-manafort>.

and other services for himself that were purchased in the United States.⁷¹ In Manafort's indictment, the Special Counsel's Office alleged that Manafort engaged in more than 200 transactions involving wire transfers from shell companies and offshore accounts in Cyprus and the Grenadines to an assortment of vendors in New York, Virginia, South Carolina, California, and Florida.⁷² For example, Manafort purchased a condominium in New York City through the use of a shell company named "MC Soho Holdings, LLC", but payment for the purchase was made via a wire transfer for \$2.85 million originating from a holding company in Cyprus.⁷³

In short, Manafort laundered untaxed income from a foreign jurisdiction to facilitate the purchase of an asset located inside the United States. This asset was technically owned by an LLC incorporated within the United States, but payment for the asset originated from a country with weak anti-corruption laws. This type of transaction is common and can lead law enforcement agencies on a global "cat and mouse" game.

C. CIRCUMVENTING ELECTION LAW CAMPAIGN DISCLOSURE REQUIREMENTS

Private parties that seek to provide financial support to politicians seeking public office or to contribute to a political action committee (PAC), yet wish to maintain their confidentiality, will often create a shell LLC to protect the campaign donor's true identity.⁷⁴

⁷¹ Megan Trimble, *How Paul Manafort Spent His Laundered Millions*, U.S. News & World Report (Oct. 30, 2017), <https://www.usnews.com/news/national-news/articles/2017-10-30/paul-manafort-lived-lavish-lifestyle-on-laundered-money-feds-say>.

⁷² John W. Schoen, *Here's where the government says Manafort's money went to support a 'lavish lifestyle'*, CNBC (July 31, 2018), <https://www.cnbc.com/2017/10/30/heres-where-mueller-says-manaforts-money-went.html>.

⁷³ *United States v. Paul J. Manafort, Jr. and Richard W. Gates III*, 2017 WL 6033301 (D.D.C. Oct. 30, 2017).

⁷⁴ Gian Gualco-Nelson, *Putting Names To Money: Closing Disclosure Loopholes*, 71 Hastings L.J. 1181, 1199 (2020).

More than \$1 billion in “dark money” was spent in federal elections during the 2020 election cycle.⁷⁵ According to OpenSecrets.org, included in that \$1 billion figure is roughly \$660 million in donations originating from “opaque political nonprofits and shell companies to outside groups.”⁷⁶ Moreover, “politically active nonprofits that do not disclose their donors” spent close to \$88 million in direct election spending, according to filings made available by the Federal Election Commission.⁷⁷

The most recent election cycle saw “record amounts” of donations from dark money groups to political committees, such as “Super PACs.”⁷⁸ While Super PACs are required to disclose their donors, they can still hide the true source of their funding by reporting the donor as a non-disclosing nonprofit or shell company.⁷⁹ This tactic allows dark money groups and nonprofits to get around the ruling in *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, where the United States Court of Appeals for the District of Columbia held that the Federal Election Campaign Act (FECA) required any entity—*other than political committee*—that made over \$250 worth of independent expenditures on political advertisements in a specific calendar year to disclose the name of every donor who gave the entity over \$200 in aggregate contributions.⁸⁰ The tactic of nonprofits donating directly to political committees and not spending directly on advertisements enables them to avoid disclosing the names of their donors

⁷⁵ Anna Massoglia and Karl Evers-Hillstrom, ‘Dark money’ topped \$1 billion in 2020, largely boosting Democrats, OpenSecrets.org (Mar. 17, 2021), <https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 971 F.3d 340, 351 (D.C. Cir. 2020).

by utilizing the protection afforded to political committees from the *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n* ruling.

As long as nonprofit organizations are not required to disclose their donors while engaging in direct spending, the identity of an LLC's beneficial owner will continue to evade good government groups seeking to identify where "dark money" is being spent and who is behind the donations. While increased transparency into the beneficial owner of an LLC will not curb the use of money in our politics, it will help hold individuals accountable and remove their veil of secrecy.

V. A TRANSPARENT FUTURE? THE PASSING OF THE CORPORATE TRANSPARENCY ACT

This section will evaluate pieces of legislation that seek to curb the use of LLCs and other corporate entities that facilitate criminal activity like tax evasion and money laundering. First, we will look at the recently passed Corporate Transparency Act in the United States, and how it seeks to provide transparency into beneficial ownership behind LLCs and establish reporting requirements that will enable federal law enforcement agencies to efficiently investigate criminal activity that is facilitated by the use of LLCs. Second, we will venture across the Atlantic Ocean and review the European Union's Anti-Money Laundering Directive. Third, we will compare the Corporate Transparency Act against the European Union's Anti-Money Laundering Directive and address the strengths and weaknesses of both initiatives. Finally, we will address some of the benefits that will result from the Corporate Transparency Act, and some of the burdens that it will impose on business owners.

A. THE CORPORATE TRANSPARENCY ACT

On January 1, 2021, Congress passed the National Defense Authorization Act for Fiscal Year 2021, which includes the Corporate Transparency Act (the CTA).⁸¹ The passing of the CTA reflects a major shift in the American political system to curb the facilitation of illicit activities through LLCs. The stated goal of the CTA is to provide federal legislation for the collection of beneficial ownership information for corporations, LLCs, or other similar entities formed under the laws of the states to:

“(A) set a clear, Federal standard for incorporation practices; (B) protect vital United States national security interests; (C) protect interstate and foreign commerce; (D) better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and (E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards.”⁸²

The CTA requires all businesses in the United States to file “beneficial ownership” information with the Financial Crimes Enforcement Network (FinCEN) of the United States Department of the Treasury.⁸³ This requirement involves filing report that provides the name, date of birth, current address, and unique identification number (e.g., from a passport or driver’s license) of the company’s “beneficial owner(s)” to FinCEN. This information must be updated every year to reflect any changes with the entity.⁸⁴

The term “beneficial owner” under the CTA applies to any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise: (i)

⁸¹ Jay Adkisson, *Congress Passes Corporate Transparency Act To Require Beneficial Ownership Filings For LLCs And Corporations*, FORBES (Jan. 26, 2021), <https://www.forbes.com/sites/jayadkisson/2021/01/26/congress-passes-corporate-transparency-act-to-require-beneficial-ownership-filings-for-llcs-and-corporations/?sh=3525957947af>; National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 6401 – 6403 (2021).

⁸² National Defense Authorization Act for Fiscal Year 2021 at § 6402.

⁸³ *Id.*

⁸⁴ *Id.*

exercises substantial control over an entity; or (ii) owns or controls at least 25% of the ownership interests in an entity.⁸⁵ However, the following are exempt from the term “beneficial owner”:

- a minor child, as defined in the State in which the entity is formed, if the information of the parent or guardian of the minor child is reported in accordance with this section;⁸⁶
- an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;⁸⁷
- an individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person;⁸⁸
- an individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance;⁸⁹ or
- a creditor of a corporation, limited liability company, or other similar entity, unless the creditor meets the requirements of subparagraph (A).⁹⁰

The reporting requirements for the CTA apply to existing corporations, LLCs, and other similar entities, and also to new entities when they are formed.⁹¹ However, there are exemptions for larger companies, heavily regulated companies, and companies that already provide information to a relevant government agency.⁹² The exemptions apply to the following companies and organizations:

⁸⁵ 31 U.S.C.A. §5336 (a)(3)(A)(i)-(ii) (West).

⁸⁶ 31 U.S.C.A. §5336 (a)(3)(B)(i) (West).

⁸⁷ 31 U.S.C.A. §5336 (a)(3)(B)(ii) (West).

⁸⁸ 31 U.S.C.A. §5336 (a)(3)(B)(iii) (West).

⁸⁹ 31 U.S.C.A. §5336 (a)(3)(B)(iv) (West).

⁹⁰ 31 U.S.C.A. §5336 (a)(3)(B)(v) (West).

⁹¹ National Defense Authorization Act for Fiscal Year 2021, *supra* note 81, at § 6403.

⁹² *Id.*

- Companies that employ more than 20 people, report revenues of more than \$5 million on tax returns, and have a physical presence in the United States;⁹³
- Most financial services institutions, including investment and accounting firms, securities trading firms, banks, and credit unions that report to and are regulated by government agencies such as the Securities and Exchange Commission, the Office of the Comptroller of the Currency, or the FDIC;⁹⁴ and
- Churches, charities, and other nonprofit organizations.⁹⁵

The information collected by FinCen is not available to the public, and can only be used for law enforcement, national security, or intelligence purposes.⁹⁶ Any data or information collected by FinCen may only be released to:

- A federal, state, local, or tribal law enforcement agency conducting an active investigation;⁹⁷
- A federal agency making the request on behalf of a foreign law enforcement agency under mutual legal assistance protocols;⁹⁸ and
- A financial institution conducting due diligence under the Banking Secrecy Act or USA PATRIOT Act – with customer consent.⁹⁹

Violations of the CTA can result in significant criminal and civil penalties. Violations of the CTA carry civil penalties of up to \$500 for every day the violation continues and criminal fines up to \$10,000 and/or imprisonment for up to two years.¹⁰⁰ The unauthorized disclosure of

⁹³ 31 U.S.C.A. §5336 (a)(11)(B)(xx) (West).

⁹⁴ 31 U.S.C.A. §5336 (a)(11)(B)(x)-(xviii) (West).

⁹⁵ 31 U.S.C.A. §5336 (a)(11)(B)(xix) (West).

⁹⁶ 31 U.S.C.A. §5336 (c)(2)(B)(i)-(ii) (West).

⁹⁷ 31 U.S.C.A. §5336 (c)(2)(B)(i) (West).

⁹⁸ 31 U.S.C.A. §5336 (c)(2)(B)(ii) (West).

⁹⁹ 31 U.S.C.A. §5336 (c)(2)(B)(iii) (West).

¹⁰⁰ 31 U.S.C.A. §5336 (h)(3)(A) (West).

information collected under the Act carries the same \$500-per-day civil penalty but also includes a higher criminal penalty of up to \$250,000 and/or a higher maximum term of imprisonment of five years.¹⁰¹ Unauthorized disclosure includes both a disclosure by a government employee and disclosure by a third-party recipient of information under the CTA.¹⁰²

The CTA marks a momentous first step by the United States to reign in the abuses of beneficial owners of LLCs and will hopefully change the perception of the United States and some of its states as a haven for secrecy and illegality.

B. THE EUROPEAN UNION’S ANTI-MONEY LAUNDERING DIRECTIVE

The European Union’s Anti-Money Laundering Directive (“AMLD”) was enacted to address “existing differences in the definition, scope and sanctions of money laundering offences affect cross-border police and judicial cooperation between national authorities as well as the exchange of information” and that “[t]hese differences in legal frameworks can also be exploited by criminals and terrorists, who could carry out financial transactions where they perceive anti-money laundering measures to be weakest.”¹⁰³ To counter these weaknesses, the AMLD requires all members of the European Union (“EU”) to improve their anti-money laundering and counterterrorism financing procedures by (1) strengthening national laws that govern disclosure of beneficial owners and (2) by creating shared registers of beneficial owners.¹⁰⁴

¹⁰¹ 31 U.S.C.A. §5336 (h)(3)(B) (West).

¹⁰² 31 U.S.C.A. §5336 (h)(2) (West).

¹⁰³ *Security Union: Proposal for a Directive on Countering Money Laundering by Criminal Law – Questions & Answers*, EUROPEAN COMM’N (Dec. 21, 2016), http://europa.eu/rapid/press-release_MEMO-16-4452_en.htm.

¹⁰⁴ *The Fourth EU Anti Money Laundering Directive*, DELOITTE 2 (2015), https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/FinancialServices/investmentmanagement/ie_2015_The_Fourth_EU_Anti_Money_Laundering_Directive_Deloitte_Ireland.pdf.

In 2017, the European Parliament and the EU Council finalized an agreement on the latest amendments to the AMLD.¹⁰⁵ The amendments seek to restrict funding for white-collar crimes (e.g., tax evasion) by use of the global financial system.¹⁰⁶ The amendments require EU member states to implement the following measures:

- Registers of beneficial owners of firms will be made publicly accessible and interconnection between national registries will be improved;¹⁰⁷
- Registers of beneficial owners of trusts and similar legal arrangements will only be publicly accessible where there is legitimate need;¹⁰⁸
- Information on national banks and safe deposit boxes will be registered as well as data on real estate ownership (only to public authorities);¹⁰⁹
- The 5th AMLD introduces a requirement for member states to verify beneficial ownership information submitted to their registries;¹¹⁰ and
- EU bank customers who send funds internationally must provide personal data so it can be transmitted to all banks in the payment chain.¹¹¹

The AMLD is a strong piece of legislation that seeks to aggressively crack down on money laundering and other illegal acts that are sheltered by jurisdictions with obscurity-centered financial disclosure laws. The AMLD also seeks to hold parties establishing shell

¹⁰⁵ Robert van der Jagt, *Euro Tax Flash from KPMG's EU Tax Centre*, KPMG (Dec. 22, 2017), <https://home.kpmg.com/xx/en/home/insights/2017/12/etf-351-amld5-and-ubo-agreement.html>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Aleksandar Ivanovski, Mary Dineen, Filipa Correia & Piergiorgio Valente, *CFE's Tax Top 5: Key Tax News of the Week*, CFE (Dec. 18, 2017), <https://www.iec-iab.be/fr/membres/publication/actualite/Institut/Documents/2017/CFETax-Top-5-18-December-2017.pdf>.

¹¹¹ Denis O'Connor, *EU Fifth Anti-Money Laundering Directive: Can Banks Handle It*, KYC360 (Nov. 21, 2017), <https://kyc360.com/article/eu-fifth-anti-money-laundering-directive-key-points-banks>.

companies, such as lawyers and banks, responsible by imposing due diligence and monitoring requirements. In sum, the AMLD is a robust attempt to bring transparency to financial disclosure requirements and encourage cooperation in enforcing these laws among member states.

C. COMPARING THE CTA AND THE EU'S ANTI-MONEY LAUNDERING DIRECTIVE

The AMLD and CTA are two significant acts of legislation that seek to accomplish similar goals. However, although their goals are similar, the AMLD and CTA are significantly different in terms of their impact and reporting requirements.

Both the AMLD and CTA strengthen financial disclosure laws and seek to improve transparency into the identity of entity's beneficial owner.¹¹² Additionally, the AMLD and CTA require all reporting companies to file reports containing critical identification information with their respective government agencies.¹¹³ These reporting requirements are the key takeaway of each the AMLD and CTA. In theory, the reporting requirements will hold parties with shell companies accountable, ease the burden for law enforcement agencies investigating crimes like money laundering and tax evasion, and increase financial transparency.

Although the AMLD and CTA have similar ends, the means by which they seek such ends vastly differ. For example, the AMLD requires that registers containing beneficial ownership information be made available to the public while the CTA restricts access to such information to strictly law enforcement agencies engaged in a criminal investigation and other limited situations involving financial institutions complying with the PATRIOT ACT.¹¹⁴

Another key difference between the AMLD and the CTA is that the former also requires trusts

¹¹² National Defense Authorization Act for Fiscal Year 2021, *supra* note 81; *The Fourth EU Anti Money Laundering Directive*, *supra* note 104.

¹¹³ *Id.*

¹¹⁴ van der Jagt, *supra* note 106; 31 U.S.C.A. §5336 (c)(2)(B)(i)-(iii) (West).

and other similar legal arrangements to comply with the terms of the beneficial ownership requirements while the scope of the CTA does not reach such trusts or general partnerships that do not require filing with a secretary of state or similar office.¹¹⁵

While the AMLD appears to have more substantial and more robust reporting requirements, it is important to note that this is just the first iteration of the CTA, and additional future legislation could strengthen some of the law's weaknesses and close its loopholes. However, due to the cultural and legal differences between the United States and Europe, it is unlikely that the CTA will replicate all AMLD provisions, like publicly available beneficial ownership registers, and will continue to consider the burden compliance with the law imposes on reporting entities and privacy-related concerns surrounding reporting requirements.

D. WILL THE CTA WORK?

While there is strong support behind the beneficial owner disclosure requirements in the CTA, those opposed to mandating disclosure of beneficial ownerships argue that it is unnecessary because “beneficial ownership transparency has not posed a significant problem” and law enforcement agencies in the United States already possess a broad “range of investigatory powers to compel the disclosure of beneficial ownership information” when needed.¹¹⁶

Although requiring LLCs to disclose beneficial ownership information is crucial and necessary to curb illicit activities, it is not the only action that the United States must take to prevent crimes such as tax evasion and money laundering. Beneficial ownership disclosure is most effective when accompanied by well-drafted and concise criminal tax laws, continual

¹¹⁵ van der Jagt, *supra* note 105; *Corporate Transparency Act: New Federal Reporting Requirements for Certain U.S. Formed or Registered Entities*, Sidley Austin (Feb. 17, 2021), <https://www.sidley.com/en/insights/newsupdates/2021/02/corporate-transparency-act>.

¹¹⁶ Kalant, *supra* note 35, at 1063.

enforcement of those criminal laws, improvements reflecting advancements in technology, and persistent political will by both major political parties in Washington D.C.¹¹⁷ Moreover, it will be crucial to ensure that the CTA is properly implemented over the next few months as FinCen engages in rulemaking over how the beneficial ownership information reporting provisions are implemented.¹¹⁸

Certain critics of the CTA think that the law is likely to create substantial administrative burdens on investors and small business owners.¹¹⁹ For example, LLC managers might have to seek legal counsel to determine if reporting is required and, if so, how to make proper filings to remain in compliance.¹²⁰ Some attorneys assert that the reporting requirements are also likely to overwhelm the government's existing compliance capabilities.¹²¹ Although acknowledging that the CTA has a noble objective, these critics believe that the law is also likely to create outsized burdens on the business and investment communities.¹²²

Critics of the CTA have valid concerns about the impact of the law, but the benefits of the CTA cannot be ignored and likely outweigh the initial burden placed on small business owners. Like most pieces of controversial legislation, initial compliance with the CTA will result in growing pains before businesses ultimately become comfortable with their routine reporting requirements. While compliance with the CTA might add an increased burden on

¹¹⁷ Jenik Radon & Mahima Achuthan, *Beneficial Ownership Disclosure: The Cure for the Panama Paper Ills*, 70 J. INT'L. AFF. 87, 87 (2017), <https://jia.sipa.columbia.edu/beneficial-ownership-disclosure-%C2%A0cure%CC2%A0-panamapapers-ills%C2%A0>.

¹¹⁸ FIN. CRIMES ENF'T NETWORK (FINCEN), U.S. DEPT. OF THE TREASURY, *FinCEN Launches Regulatory Process for New Beneficial Ownership Reporting Requirement*, Press Release (Apr. 1, 2021), <https://www.fincen.gov/news/news-releases/fincen-launches-regulatory-process-new-beneficial-ownership-reporting>.

¹¹⁹ Michael Tuchman, *What to Know about the Corporate Transparency Act and Its Reporting Requirements*, Levenfeld Pearlstein, LLC (Jan. 7, 2021), <https://www.lplegal.com/content/corporate-transparency-act-reporting-requirements.html>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

small business owners, the cost of inaction related to beneficial ownership in LLCs is no longer palatable. Moreover, in this case, the cost of inaction is actually quantifiable. Charles Rettig, the Internal Revenue Service commissioner, recently testified that the United States government is losing approximately \$1 trillion per year in unpaid taxes at the hands of tax evaders and other individuals who use pass-through entities like LLCs to avoid their tax obligations.¹²³ This is an unconscionable amount of money that could be used to better the lives of tens of millions of United States citizens. To paraphrase Senator Everett Dirksen: a trillion here, a trillion there, and pretty soon you are talking about real money.

The United States government cannot rely on the CTA alone to curb the use of LLCs to facilitate illegal schemes. While the CTA is a terrific starting point, Congress must act to ensure that the law is monitored and enforced. To enable agencies like FinCen, the IRS, and the Department of Justice to enforce the CTA, Congress must provide these institutions with adequate resources. Without the financial ability to increase staff hiring and update technology systems, the agencies tasked with enforcing the CTA will not be able to curb the activities the law seeks to prevent.

As the CTA is implemented, additional steps may also be required to end the use of shell companies. Should the United States government wish to increase beneficial ownership transparency even further, it may want to consider creating a shared beneficial ownership registry that is available to the general public. While such a policy measure will likely implicate politically sensitive topics like privacy, it should be considered a measure of last resort should

¹²³ Allan Rappeport, *Tax cheats cost the U.S. \$1 trillion per year, I.R.S chief says.*, The New York Times (Apr. 13, 2021), <https://www.nytimes.com/2021/04/13/business/irs-tax-gap.html#:~:text=The%20United%20States%20is%20losing,surged%20in%20the%20last%20decade.&text=Rettig%20said,.do%20get%20outgunned%2C%E2%80%9D%20Mr.>

LLCs be continued to be used as a vehicle for illicit activity. A shared beneficial ownership registry could deter individuals from using LLCs as a shell company because of fear of public backlash or bad publicity.

Another policy solution that the federal government should consider for future iterations of the CTA is the use of multilateral and bilateral agreements with foreign nations. Multilateral and bilateral agreements would allow participating countries to exchange beneficial ownership information of LLCs and shell companies suspected of being engaged in illegal activities. Although the CTA contains provisions that allow foreign nations to request beneficial ownership information if they are conducting a criminal investigation that involves an LLC incorporated in the United States, the process appears to be burdensome. If the process for foreign nations to obtain the requested information becomes overly burdensome, it will likely be in the United States interest to explore the possibility of implementing a multilateral agreement among a select group of countries. A multilateral agreement that facilitates the exchange of information would also benefit the United States because a significant portion of the abuse of LLCs in U.S. jurisdictions derives from suspicious foreign nationals looking to “clean” their money obtained from illegal activities by investing in assets in the U.S. through LLCs.

The passage of the CTA is a crucial step in combatting the use of LLCs to hide the true identity of individuals behind the company. Despite valid concerns about the regulatory burdens imposed on small business owners, the CTA is necessary to stem tax evasion, money laundering, and many other crimes. The CTA is the first step in improving financial disclosure laws in the United States, but it should not be the last. Congress should actively monitor how individuals react to the CTA and determine if additional action is needed to ensure that the use of LLCs and other corporate entities are not being abused to facilitate illegal activity.

VI. CONCLUSION

The use of LLCs acting as a shell company has gone unchecked for decades. The types of criminals incorporating LLCs to facilitate their illegal activity run the gamut from white-collar criminals seeking to evade taxes to Russian international arms dealers. The Corporate Transparency Act will hopefully improve law enforcement agencies' ability to ascertain the true beneficial owner of an LLC that is part of a criminal investigation. However, the Corporate Transparency Act is not a perfect piece of legislation, and Congress must continue to monitor the utilization of LLCs as a vehicle for criminal activity to ensure that federal financial disclosure requirements are adequate and properly enforced.